80-1861

No.

Office-Supreme Court,
F I L E D
JUN 9 1981
ALEXANDER STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, ET AL., APPELLANTS

VS.

ROBERT RODGERS AND JOHNNY HAMPTON, APPELLEES

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEES' MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, Appellees move to dismiss this appeal, or in the alternative, to affirm the judgment of the Michigan Supreme Court because the question raised is so unsubstantial as to not warrant further argument.

STATEMENT OF THE CASE

Appellees rely upon the statement of the case set forth by appellants for purposes of this motion to dismiss or affirm only.

THE DECISION IS NOT FINAL

The opinion of the Michigan Supreme Court in this case upheld a trial court's authority to authorize service of process by publication in order to obtain personal jurisdiction over a missing defendant. The opinion limited the lower court's use of publication to only those circumstances where a sufficient showing had been made that service of process was not possible by any other reasonable means. The court's opinion went on to order the case remanded to the trial court level for further proceedings to show what methods had been employed by plaintiffs to locate the missing defendants.

If on remand, the trial court concludes that the particular steps taken by the plaintiffs were not sufficiently diligent within the meaning of GCR 1963, 105.8, then plaintiffs may raise the further issue of what constitutes due diligence within the meaning of constitutional due process.

The generally held view has been that a judgment of the highest state court remanding a case to a lower court for further proceedings consistent with the judgment of the appellate court is not a final judgment, and cannot be reviewed by this Court. *See Pope v. Atlantic Coastline Rail Co.*, 345 U.S. 379, 73 S.Ct. 749, 97 L.Ed. 1094 (1953).

The authority upon which the appellants rely to convince this Court of finality is *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). The issue in *Cox* which moves this Court to use an exception to the 28 U.S.C. 1257(2) Finality Requirement had as its basis the potential for suppression of the press by a state statute which established criminal and civil sanctions in certain news reporting activities. This Court considered the constitutional issue because of the fear of stifling the press coupled with serious doubt as to the state statute's constitutionality. In the case at

bar the rationale used by the court for resort to use of publication cannot be said to be based upon a statute upon which there exists serious doubt because the order permitting publication was allowed only after all other means of service were exhausted. Further, the potential for harm and abuse by suppression of First Amendment rights and by threat of criminal sanctions is not present here. The potential for abuse of process in publication cases is eliminated by the requirement of close scrutiny by the trial court. The trial court's inquiry of the due diligence shown by plaintiffs in attempting to locate missing defendants would permit use of publication in only the most unusual of circumstances. The serious and profound implications of the statute involved in the *Cox* case are simply not present in the case at bar. To the contrary, a finding of finality on this question would eliminate the opportunity for this Court to determine what due process standards must be met before publication can result in personal jurisdiction over a missing defendant.

THE QUESTION IS UNSUBSTANTIAL

The issue on this appeal cannot be said to raise a substantial constitutional question not previously settled by this Court. GCR 1963, 105.8, the local Michigan court rule at issue here, adopts the constitutional standard originally set forth by this Court in *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940), *i.e.*, a method of service "reasonably calculated to give . . . actual notice of the proceedings and an opportunity to be heard." Other important decisions of this Court have established limits to which a particular service of process method may go in obtaining personal jurisdiction. In *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), it was held that due process requires

a certain minimum contact with a state be shown such that "traditional notions of fair play and substantial justice" are not offended. In *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), this Court recognized that resort to publication to obtain personal jurisdiction can sometimes not be avoided. In these situations the trial court must weigh the conflicting rights of both plaintiff and the defendant. The right of a defendant to actual notice and an opportunity to be heard is a right subject to practical limitations. These limitations may vary on a case by case basis. To distill these limitations to specific and narrow principles of law as appellants suggest is impractical and unworkable. Rather, a more reasoned view is to weigh each case by the broad principles set forth by this Court in the *Milliken* and *Mullane* cases. Many state courts in dealing with similar constructive service situations have held that the totality of circumstances must be weighed before a particular method of service would be rejected. In *Dobkin v. Chapman*, 21 N.Y.2d 490, 289 N.Y.S.2d 161, 236 N.E.2d 451 (1968), the New York court set forth several of these factors. They include: (1) protection of the plaintiff's legitimate interest; (2) the state's interest in providing suitable relief; (3) the due diligence applied in attempting to locate the missing defendant; (4) the nature of the incident giving rise to the litigation; (5) the presence of an insurer; (6) the ability of the defendant to appear and set aside a default judgment. These factors are discussed in detail in *Constitutionality of Constructive Service of Process on Missing Defendants*, 48 N.C.L. Rev. 616 (1970). Each of these factors is considered in light of the constitutional mandates of the *Mullane* and *Milliken* cases. Fairness in notice is all that is required and this is not subject to specific rules which should issue out of this Court but must be dealt with on a case by case basis viewing all relevant factors. *See Melton v. Johnson*, 242 Ga. 400, 249 S.E.2d 82 (1978).

It is interesting to note that in appellants' survey of state law, the only case that they have discovered which was diametrically opposed to the Michigan Supreme Court decision was *Barnes v. Continental Insurance Co.*, 231 Ga. 246, 201 S.E.2d 150 (1973). This case was subsequently modified by the *Melton* case to permit resort to publication where it could be shown that the defendant had certain state contact and had notice of the pendency of the litigation. The *Melton* case illustrates the application of the *Dobkin* factors, *i.e.*, a case by case approach. Certainly the facts of the case at bar can be readily applied to the *Dobkin* analysis, *i.e.*, the defendants were notified while in prison of the pendency of other litigation arising out of the accident they caused.

In short the reasoning of the appellants in asking this Court to review the decision of the Michigan Supreme Court is based upon factors which differ with each case presented. An all encompassing pronouncement from this Court would be more likely to confuse and further complicate the delicate balance between the rights of plaintiffs and the rights of defendants. It has been shown there are numerous relevant factors which would compel a trial court to fashion a particular mode of constructive service appropriate to the situation. This scrutiny is limited only by the trial court's adherence to the flexible well reasoned constitutional principles set forth by this Court in *Milliken* and *Mullane*.

CONCLUSION

For the foregoing reasons this appeal should be dismissed or the decision of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

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Dated: June 4, 1981